

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,
individually and on behalf of NORFOLK
& PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Plaintiff,

v.

Civil Action No. 2:18-cv-530-MSD-RJK

NORFOLK SOUTHERN RAILWAY
COMPANY, *et al.*,

Defendants.

PROPOSED FINAL PRETRIAL ORDER

Plaintiff CSX Transportation, Inc. (“CSX”) and Defendants Norfolk Southern Railway Company (“NS”) and Norfolk and Portsmouth Beltline Railway Company (“NPBL” or the “Belt Line”) submit the following proposed Final Pretrial Order pursuant to the Court’s Order (ECF No. 505), the Federal Rules of Civil Procedure, and the Local Rules of this Court. The Parties have stipulated as to various matters identified herein, and have identified the following exhibits, witnesses, factual contentions, and triable issues.

It is thus ORDERED as follows:

I. STIPULATION OF UNDISPUTED FACTS AND LEGAL CONTENTIONS

1. The parties stipulate and agree that the conduct at issue in this case has an effect on interstate commerce.

2. CSX and NS are Class 1 railroads operating in the eastern United States. CSX and NS compete for the rail transportation of international intermodal containers delivered to or from ports on the East Coast of the United States.

3. NPBL is a terminal switching railroad (sometimes called a “short line”) located in Hampton Roads, Virginia. NPBL is currently owned 57% by NS and 43% by CSX.

4. NPBL was formed in 1896 by eight railroads. NPBL’s purpose is to interchange or “switch” rail cars for other railroads. NPBL receives cars tendered by other railroads and delivers them to locations on its rail line, or vice-versa.

5. NPBL’s business and affairs are governed by an Operating Agreement, dated July 7, 1897 (the “Operating Agreement”), as amended. ECF No. 1-1.

6. On March 1, 1989, the NPBL’s then-existing owners—CSX, Norfolk and Western Railway Company (“NW”) and Southern Railway Company (“SR”)—entered into a Supplemental Agreement amending the Operating Agreement to allow CSX to appoint two directors and NW and SR to collectively appoint three directors.

II. EXHIBITS

1. The Parties have segregated the documents, summaries, and other exhibits that may be offered into evidence at trial into four exhibit lists. A joint list of agreed exhibits will be submitted to the Court at the Final Pretrial Conference as **Exhibit A**. CSX’s Exhibit List and Defendants’ objections thereto are attached as **Exhibit B**. NS’s Exhibit List and CSX’s objections thereto are attached as **Exhibit C**. NPBL’s Exhibit List and CSX’s objections thereto are attached as **Exhibit D**.

Unless otherwise ordered, the Parties agree to deliver to the Court three copies of their respective exhibits, sequentially numbered with tabs in binders, one day before trial.

2. The Parties have discussed their objections and will continue their efforts to narrow and resolve the objections to each other’s proposed exhibits. Many exhibit objections by the Parties relate to pending motions, and may be resolved by the rulings on these motions. The Parties

reserve their rights to make and pursue objections to individual exhibits based on rulings on the pending motions. The Parties also agree to reserve rights to require a foundation for the admission of any exhibit and to object on hearsay grounds at trial.

3. The Parties agree that any documents identified on the exhibit lists attached hereto that were produced from a Party's own files shall be deemed authentic unless specifically objected to on that basis by another Party. The Parties shall work together to identify any exhibits that remain subject to any specific authenticity objections. This provision shall not be deemed to resolve any hearsay objections or other aspects of foundation objections for exhibits.

4. The Parties agree that to the extent an exhibit is excluded from one Party's exhibit list, it is excluded for all purposes and no Party may use it, even if it remains on another Party's exhibit list. The Parties agree that inclusion of an exhibit on a Party's list shall not be deemed a waiver of the Party's right to object to the exhibit, given that exhibit lists have been prepared before receiving rulings on pending summary judgment and other motions, and may be included protectively on the exhibit list.

5. The Parties agree that documents, summaries, and other exhibits listed on the exhibit lists to which no objection has been specified at trial may be introduced into evidence by any Party; provided, however, all exhibits shall be introduced into evidence on the record at trial, either in the course of testimony about the exhibit at trial, either live or by deposition, or, if a joint exhibit, by motion on the record for admission.

6. The exhibit lists set forth the Parties' exhibits for their respective cases-in-chief; the exhibit lists do not include potential cross-examination or impeachment exhibits that may or may not be introduced into evidence. The Parties reserve the right to offer such potential exhibits for purposes of cross-examination or impeachment.

III. WITNESSES

The Parties adopt and incorporate by reference their objections to proposed witness testimony, whether by deposition or live, to the extent that testimony is the subject of any Party's motion in limine or *Daubert* motion.

For those witnesses expected to testify by deposition, attached as **Exhibit E** are tables indicating the page and line numbers designating each witnesses' testimony, objections lodged by the Parties, and counter-designations of the testimony.

A. CSX's Witnesses

CSX expects to call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Allan, Jim	Live or By Deposition; to be determined	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Armbrust, Steven	Live	
Booth, John	Live or By Deposition; to be determined	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Capozzi, Thomas	Live	NPBL and NS: <i>See</i> NPBL MIL #3 (ECF 359)
Coleman, Donna	Live	
DiDeo, Tony	Live	

Name of Witness	Live/By Deposition	Objections
Eliasson, Fredrik	By Deposition	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Girardot, Rob	Live	NS and NPBL: <i>See</i> NPBL MIL #2,4 (ECF 353, 365); NS MIL (ECF 332)
Heller, Jeffrey	Live or By Deposition	
Kendall, Quintin	By Deposition	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Kenney, Maryclare	Live	NS and NPBL: <i>See</i> NS MIL (ECF 332)
Luebbers, Christopher	Live or By Deposition	
Martinez, Robert	Live or By Deposition	
Marvel, Dr. Howard	Live	NPBL: <i>See</i> NPBL MIL #5 (ECF 473); NS MIL (ECF 332) NS: NS’s MSJ if granted as to CSX’s antitrust claims renders entirety of anticipated testimony inadmissible under Federal Rules of Evidence 401, 402, and 403. <i>See also</i> NPBL MIL #5 (ECF No. 473);NS MIL (ECF No. 332)

Name of Witness	Live/By Deposition	Objections
McClellan, Michael	Live or By Deposition	
Moss, Cannon	Live	
Norfolk & Portsmouth Belt Line Railroad Company Rule 30(b)(6) Corporate Representative	Live or By Deposition	
Piacente, Dean	By Deposition	
Strongosky, Jay	Live	
Vick, Catherine J.	Live	NPBL and NS: <i>See</i> NPBL MIL #3 (ECF 359)
Warren, Carl	By Deposition	NPBL and NS: <i>See</i> NPBL MIL #4 (ECF 365); NS MIL (ECF 332)
Virginia International Terminals, LLC Rule 30(b)(6) Corporate Representative	Live	NPBL and NS: <i>See</i> NPBL MIL #3 (ECF 359)
Virginia Port Authority Rule 30(b)(6) Corporate Representative	Live	NPBL and NS: <i>See</i> NPBL MIL #3 (ECF 359)

CSX may call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Booth, Cary	Live or By Deposition	
Burns, Michael	Live	
Hall, Jerry	By Deposition	
Houfek, Ryan	Live or By Deposition; to be determined	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Hunt, Randall	Live or By Deposition	
Hurlbut, Thomas	By Deposition	

Name of Witness	Live/By Deposition	Objections
Ingram, Tony	By Deposition	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Joyner, Kenneth	Live or By Deposition	
MacDonald, Tony	Live	
Merilli, Philip	By Deposition	
Norfolk Southern Rule 30(b)(6) Corporate Representative	Live or By Deposition	
Stinson, David	Live or By Deposition; to be determined	NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).
Wahidi, Salmaan	Live	
Wagel, Christopher	By Deposition	NPBL and NS: <i>See</i> NPBL MIL #4 (ECF 365); NS MIL (ECF 332)
Wheeler, Michael	Live or By Deposition; to be determined	NPBL: Statute of limitations; Fed. R. Evid. 401, 403 NS: Federal Rules of Evidence 401, 402, and 403(NS MSJ –Statute of Limitations).

B. NS's Witnesses

NS expects to call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Cannon Moss	Live	
Randall Hunt	Live	
Matthew Wright	Live	

Name of Witness	Live/By Deposition	Objections
Jeffrey Heller	Live	
Michael McClellan	Live	
Cary Booth	Live	
Robert Martinez	Live	

NS may call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Donna Coleman	Live	
Thomas Crowley	Live	
David Stinson	To be determined	
Leslie Farless	Live	
Jerry Hall	To be determined	
Phillip Merilli	To be determined	
C.H. (“Jake”) Allison	Live	
Thomas Hurlbut	To be determined	
Mark Manion	Live	
Michael Wheeler	To be determined	
Michael Burns	Live if called live by CSX, otherwise by deposition	

C. NPBL’s Witnesses

NPBL expects to call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Cannon Moss	Live	
William O’Brien	Live	
Thomas Crowley	Live	

NPBL may call the following witnesses at trial:

Name of Witness	Live/By Deposition	Objections
Donna Coleman	Live	
Adam Reeder	Live	
Joe Donnelly	Live	
Rachel Sears	Live	
David Gooden	To be determined	
Matthew Wright	Live	
Anthony MacDonald	By Deposition	

Name of Witness	Live/By Deposition	Objections
Ryan Houfek	By Deposition	
Jay Strongosky	By Deposition	
Anthony DiDeo	By Deposition	
John Booth	By Deposition	
Steven Armbrust	By Deposition	
Michael Burns	By Deposition	
Tony Ingram	By Deposition	
Jermaine Swafford	By Deposition	
Rob Girardot	By Deposition	
David Stinson	By Deposition	
Tom Capozzi	By Deposition	

The Parties agree that all witnesses identified as witnesses whom they “will call” to testify “live” will in fact appear at trial, barring illness or other unforeseen circumstances beyond the witness’s control. In the event that a witness so identified does not appear at trial, and that witness’s deposition testimony has not been previously introduced by an opposing Party at trial, an opposing Party may offer any otherwise-admissible deposition testimony by that witness, regardless of whether the Party seeking to offer such testimony previously designated it. The Parties each reserve the right to call any witness listed on another Party’s witness list, and expressly reserve the right to call witnesses not listed for rebuttal or impeachment; provided, however, that while the Parties will work cooperatively, nothing herein shall be deemed to require a Party to produce a “live” witness at a time requested by another Party.

IV. FACTUAL CONTENTIONS

CSX’s Factual Contentions are attached as **Exhibit F**. NS’s Factual Contentions are attached as **Exhibit G**. NPBL’s Factual Contentions are attached as **Exhibit H**. The Parties agree that these lists are not exhaustive and may be supplemented, and that the absence of a factual

contention shall not constitute waiver and shall not preclude the admission of relevant evidence at trial.

V. TRIABLE ISSUES

A. CSX's Triable Issues

Count I: Conspiracy to Restrain Trade (Sherman Act Section 1) v. NS and NPBL

1. Whether NS and NPBL knowingly conspired to restrain trade in the relevant market by foreclosing CSX's ability to access on-dock rail at NIT.
2. Whether NS or NPBL committed an overt act in furtherance of that conspiracy.
3. Whether Defendants' conspiracy to restrain trade harms competition in the relevant market.
4. Whether Defendants' conspiracy injured CSX's business.
5. In what amount did Defendants' conspiracy to restrain trade injure CSX.
6. Whether CSX is entitled to injunctive relief pursuant to the Clayton Act.

Count II: Conspiracy to Monopolize (Sherman Act Section 2) v. NS and NPBL

7. Whether NS and NPBL knowingly conspired to foreclose CSX's ability to access on-dock rail at NIT with the specific intent that NS would obtain and maintain monopoly power in the relevant market.
8. Whether NS or NPBL committed an overt act in furtherance of that conspiracy.
9. Whether Defendants' conspiracy to monopolize harms competition in the relevant market.
10. Whether Defendants' conspiracy to monopolize injured CSX's business.
11. In what amount did Defendants' conspiracy to monopolize injure CSX.

Count III: Monopolization (Sherman Act Section 2) v. NS

12. Whether NS possesses monopoly power in the relevant market.
13. Whether NS willfully acquired or maintained its monopoly power by engaging in anticompetitive conduct.
14. Whether NS's monopolistic conduct harms competition in the relevant market.
15. Whether NS's monopolistic conduct injured CSX's business.
16. In what amount did NS's exercise of monopoly power injure CSX.

Count IV: Attempted Monopolization (Sherman Act Section 2) v. NS

17. Whether NS engaged in anticompetitive conduct in the relevant market.
18. Whether NS had specific intent to obtain monopoly power in the relevant market.
19. Whether there was a dangerous probability that NS would achieve its goal of obtaining monopoly power in the relevant market.
20. Whether NS's attempted monopolization injured CSX's business.
21. In what amount did NS's attempted monopoly injure CSX.

Count V: Breach of Contract v. NS

22. Whether the Operating Agreement constitutes a contract between NS and CSX.
23. Whether NS breached the Operating Agreement.
24. Whether NS's breaches of the Operating Agreement injured CSX.
25. In what amount did NS's breaches of the Operating Agreement injure CSX.

Count VIII: Statutory Business Conspiracy (Va. Code § 18.2-499) v. NS and NPBL

26. Whether NS and NPBL knowingly conspired to foreclose CSX's ability to access on-dock rail at NIT.

27. Whether Defendants intentionally and purposefully injured CSX's business expectations.

28. Whether Defendants acted without lawful justification.

29. Whether Defendants acted with malice.

30. Whether Defendants' conspiracy has injured CSX.

31. In what amount did Defendants' business conspiracy injure CSX.

Count IX: Civil Conspiracy v. NS and NPBL

32. Whether NS and NPBL combined to accomplish an unlawful purpose.

33. Whether that unlawful purpose was, in fact, effectuated.

34. Whether Defendants acted with malice.

35. Whether CSX's injury arose as the result of Defendants' unlawful combination.

36. Whether CSX was injured by Defendants' unlawful combination.

37. In what amount was CSX injured by Defendants' unlawful combination.

Legal Issues and Injunctive and Declaratory Relief

38. Whether NS is bound by, estopped, and/or subject to judicial admissions based on its representations to the STB regarding its control over and involvement with NPBL.

39. Whether CSX is entitled to a permanent injunction prohibiting NS and NPBL from engaging in anticompetitive and unlawful behavior with respect to on-dock rail access at NIT.

40. Whether CSX is entitled to a permanent injunction to restore CSX's rights as a co-equal shareholder of NPBL and/or to establish an independent NPBL Board structure as previously proposed by CSX.

B. NS's Triable Issues

1. Whether CSX properly defined the relevant market as on-dock rail access at NIT?
2. Whether NS has monopoly power, or a dangerous probability of achieving monopoly power, in a properly defined relevant market?
3. Whether NS willfully sought to achieve or maintain monopoly power through exclusionary conduct?
4. Whether competition was harmed by NS's exclusionary conduct?
5. Whether CSX suffered damages caused by NS's exclusionary conduct that occurred within the limitations period, and if so, what the value of those damages are?
6. Whether NS and NPBL conspired to exclude CSX from the on-dock facilities at NIT?
7. Whether CSX suffered damages caused by an overt act in furtherance of the alleged conspiracy that occurred within the limitations period and without lawful justification, and if so, what the value of those damages are?
8. Whether NS materially breached its obligations to CSX under NPBL's Operating Agreement causing damages to CSX, and if so, what the value of those damages are?
9. Whether CSXT failed to mitigate its damages, if any, and if so, by how much.
10. Whether CSXT's claims are barred by the statute of limitations.
11. Whether the Belt Line's \$210 line haul switching rate is justified by the Belt Line's costs.

12. Whether the Belt Line's \$210 line haul switching rate is justified by its reasonableness.

C. NPBL's Triable Issues

1. Under Count I, whether CSXT can prove by a preponderance of the evidence that the Belt Line and NS conspired to unreasonably restrain trade or commerce.

2. Under Count II, whether CSXT can prove by a preponderance of the evidence that the Belt Line and NS conspired to monopolize trade or commerce.

3. Under Count VIII, whether CSXT can prove by clear and convincing evidence that the Belt Line and NS conspired to willfully and maliciously injure CSXT.

4. Under Count IX, whether CSXT can prove by clear and convincing evidence that the Belt Line and NS conspired to accomplish a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means.

5. Whether CSXT is entitled to damages from the Belt Line as a result of an overt act that occurred within the statute of limitations in furtherance of a conspiracy under Counts I, II, VIII, or IX, and if so, how much.

6. Whether CSXT failed to mitigate its damages, if any, and if so, by how much.

7. Whether CSXT's claims are barred by the statute of limitations.

8. Whether CSXT properly defined the relevant market as on-dock rail access at NIT.

9. Whether the Belt Line's \$210 line haul switching rate is justified by the Belt Line's costs.

10. Whether the Belt Line's \$210 line haul switching rate is justified by its reasonableness.

11. Whether the Belt Line had power to grant CSXT's 2010 or 2018 rate requests.
12. Whether the Belt Line had power to grant CSXT's 2018 corporate governance demand.

Entered this _____ day of December, 2022.

WE ASK FOR THIS:

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